CLE: Adjudication of Capital Cases in Delaware
Friday, April 11, 2008

Federal Habeas Corpus

Moderator: The Honorable Gregory M. Sleet
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U.S. District Court for the District of Delaware

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FEDERAL HABEAS CORPUS MATERIALS

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) – Relevant Provisions.

A Guide for Pursuing Federal Habeas Relief for Delaware State Prisoners

Significant Supreme Court Case Citations

A GUIDE FOR PURSUING FEDERAL HABEAS RELIEF FOR DELAWARE STATE PRISONERS

A. HOW TO DETERMINE IF YOU CAN MEET THE ONE-YEAR LIMITATIONS PERIOD FOR FILING A HABEAS PETITION

1. When did AEDPA'S one year filing period start to run?

Delaware is not subject to the special habeas corpus procedures for capital cases articulated in 28 U.S.C. § 2261 et seq. Therefore, as explained in § 2244(d)(1), the one-year filing period begins to run from the latest of four possible "trigger" dates. In most cases, however, AEDPA's limitations period will begin to run on the date determined under § 2244(d)(1)(A).

a. Section 2244(d)(1)(A): The date on which a prisoner's judgment of conviction becomes final depends on whether the petitioner filed a direct appeal and petitioned the United States Supreme Court for a writ of certiorari. For example:

(1) In non-capital cases, if the petitioner did not file a direct appeal, his conviction becomes final 30 days after the judgment of conviction. See Kapral v. United States, 166 F.3d 565, 575, 578 (3d Cir. 1999); Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999); Del. Supr. Ct. R. 6(a)(ii)(establishing a 30 day period for timely filing a notice of appeal). In Delaware, however, there is an automatic direct appeal in capital cases. Therefore, the judgment of conviction for a petitioner sentenced to death will not become final until one of the two dates described in subsections (2) and (3) below.

(2) If the petitioner filed a direct appeal but did not pursue certiorari review in the United States Supreme Court, his conviction becomes final 90 days after Delaware Supreme Court issues a mandate. See Kapral v. United States, 166 F.3d 565, 575, 578 (3d Cir. 1999); Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

(3) If the petitioner petitioned the United States Supreme Court for certiorari review of his conviction, his conviction becomes final upon issuance of the Supreme Court's decision.

b. Section 2244(d)(1)(B): The date on which the impediment to filing an application created by State action in violation of the Constitution or laws

of the United States is removed, if the applicant was prevented from filing by such State action.

(1) Example: If the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and the State did not disclose the evidence to the petitioner until after the expiration of the one-year filing period under § 2244(d)(1)(A), the limitations period would not begin to run until the date on which the petitioner received the *Brady* material. *See, e.g., Rinaldi v. Gillis*, 248 Fed. Appx. 371 (3d Cir. Sept. 19, 2007).

c. Section 2244(d)(1)(c): The date on which the constitutional right was initially recognized by the Supreme Court, but only if the Supreme Court has newly recognized the right and made such right retroactively applicable to cases on collateral review.

d. Section 2244(d)(1)(d): The date on which the factual predicate of the claim or claims could have been discovered through the exercise of due diligence.

(1) Example: The date on which the petitioner discovers that a witness lied during the petitioner's trial may trigger a later starting date for the limitations period , provided that the petitioner exercised reasonable diligence in discovering the perjury. *See, e.g., Downes v. Carroll*, 348 F. Supp. 2d 296 (D. Del. 2004).

2. Did the prisoner file any post-conviction motions that toll the limitations period under §2244(d)(2)("statutory tolling" provision)?

Motions that challenge the lawfulness of the petitioner's conviction or sentence constitute applications for Delaware post-conviction or other collateral review. *See Hartmann v. Carroll*, 492 F.3d 478, 482 (3d Cir. 2007). As a general rule, properly filed "applications for State post-conviction or other collateral review" of the prisoner's criminal conviction will toll the limitations period during the time the action is pending in the state courts, including any post-conviction appeals. *Swartz v. Meyers*, 204 F.3d 417, 424-25 (3d Cir. 2000). In order to trigger § 2244(d)(2), the Delaware post-conviction motion must be filed before the expiration of AEDPA's one year filing period. *See Long v. Wilson*, 393 F.3d 390 (3d Cir. 2004); *Barnett v. Carroll*, 514 F. Supp. 2d 619, 623 (D. Del. 2007). Please note, however, that filing a petition for a writ of certiorari in the United States Supreme Court with respect to the Delaware state court's denial of a post-conviction motion will not toll AEDPA's limitations period under § 2244(d)(2). *See Lawrence v. Florida*, 127 S.Ct. 1079, 1084-85 (2007).

a. The following Delaware post-conviction motions will trigger the

statutory tolling provision of § 2244(d)(2) if properly filed:

> (1) Capital and non-capital cases: Motion for post-conviction relief filed pursuant to Delaware Superior Court Criminal Rule 61 ("Rule 61 motion"). *See Maxion v. Snyder*, 2001 WL 848601, *10 (D. Del. July 27, 2001)(non-capital); *Gattis v.Snyder*, 46 F. Supp. 2d 344 (D. Del. 1999).
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> (2) Non-capital cases: Motion for correction of sentence filed pursuant to Delaware Superior Court Criminal Rule 35(a). *See Hartmann v. Carroll*, 492 F.3d 478 (3d Cir. 2007).
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> (3) Non-capital cases: A true Rule 35(b) motion (i.e., seeking discretionary leniency) will NOT toll AEDPA's limitations period. *See Hartmann v. Carroll*, 492 F.3d 478 (3d Cir. 2007).
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> (4) Non-capital cases: Delaware petition for writ of habeas corpus. *See Bratcher v. Snyder*, 2000 WL 718347, *3 (Del. May 23, 2000). Depending on the wording of the claim asserted in state habeas petition, statutory tolling effect of a state petition for the writ of habeas corpus may be limited by the recent decision in *Hartmann v. Carroll*, 492 F.3d 478 (3d Cir. 2007).

b. A "properly filed" motion is a motion that was delivered and accepted in compliance with the applicable Delaware rules governing filing, such as the rules prescribing the form of the document, the timing of the filing, the location of the filing, and the filing fee. *See Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000).

> (1) A Rule 61 motion is not "properly filed" for statutory tolling purposes if it was filed on the wrong form and rejected as non-compliant by the Delaware Superior Court. *See, e.g., Austin v. Carroll*, 224 Fed. Appx. 161 (3d Cir. 2007).
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> (2) A post-conviction motion is not "properly filed" if the Superior Court denies the motion as time-barred. *See Eaves v. Burris*, - F. Supp. 2d -, 2008 WL 90148 (D. Del. Jan. 8, 2008).
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> (3) Additionally, if a Rule 61 motion is timely filed, but the post-conviction appeal is denied as untimely, the Rule 61 motion will only toll the limitations period from the initial date of filing through the date on which the 30 day period for filing a timely post-conviction appeal expires. In other words, the Rule 61 motion does not toll AEDPA's limitations period for the remaining period during which the petitioner's untimely post-conviction appeal was pending

before the state supreme court. *See Eley v. Snyder*, 2002 WL 441325, at *2-3 (D. Del. Mar. 21, 2002); *Swartz v. Meyers*, 204 F.3d 417, 424 (3d Cir. 2000).

3. Are there any successful arguments for equitably tolling the limitations period?

Pursuant to Third Circuit precedent, equitable tolling in non-capital cases is only appropriate in extremely rare circumstances. The petitioner must demonstrate that he pursued his claims with reasonable diligence, and that some extraordinary circumstance prevented him from timely filing a habeas petition. For example, the fact that an attorney or pro se petitioner erroneously calculated the one-year filing period generally will not warrant equitably tolling the limitations period. However, the Delaware District Court did recently determine that an attorney's miscalculation of AEDPA's limitations period warranted equitable tolling where the habeas petition was filed only 4 days too late and the attorney's mistake was caused by the extreme stress of the her ongoing illness. The District Court noted that the attorney had suffered at least one stroke during her representation of the petitioner, and that the attorney passed away soon after the filing of the habeas petition. *Fogg v. Carroll*, 465 F. Supp. 2d 336 (D. Del. 2006).

In capital habeas cases, the Third Circuit has held that "less than 'extraordinary' circumstances [can] trigger equitable tolling of the AEDPA's statute of limitations when a petitioner has been diligent in asserting his or her claims and rigid application of the statute would be unfair." *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001). Please note, however, that the Supreme Court has not explicitly addressed the availability of equitable tolling in AEDPA cases. *Lawrence v. Florida*, 127 S.Ct. 1079, 1085 (2007). Nevertheless, in *Lawrence*, which was a capital case, the Supreme Court assumed that equitable tolling was available for the purposes of that particular case, and required the petitioner to show both diligence in pursuing his claims and that some extraordinary circumstance prevented the petitioner from timely filing the habeas petition. *Id.*

B. EXHAUSTION AND PROCEDURAL DEFAULT ISSUES

1. FAIR PRESENTATION REQUIRED FOR EXHAUSTION

Determine whether the petitioner exhausted state remedies by presenting the factual and legal substance of his federal habeas claim to the Delaware Supreme Court, either on direct appeal or in a post-conviction proceeding, in a manner that put the state supreme court on notice that a federal claim was being asserted. *See Holloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004).

a. How to satisfy the exhaustion requirement for particular claims in order to preserve them for federal habeas review

(1) Ineffective assistance of counsel claims must be presented to the Superior Court in a Rule 61 motion, and the Superior Court's judgment must be appealed to the Delaware Supreme Court. *See Shelton v. Snyder*, 2004 WL 4951050 (D. Del. Mar. 31, 2004)(capital case where ineffective assistance of counsel claim presented to Del. Sup. Ct. on post-conviction appeal was exhausted for federal habeas purposes); *Lawrie v. Snyder*, 9 F. Supp. 2d 428 (D. Del. 1998).

(2) Substantive claims: insufficient evidence, prosecutorial misconduct, erroneous jury instructions etc.

(a) Generally, these claims should be raised on direct appeal in order to avoid application of the procedural default doctrine (some claims require a contemporaneous objection during trial – check Delaware law). *See, e.g., Ortiz v. State*, 869 A.2d 285, 299 (Del. 2005)(Delaware Supreme Court reviewed claim for plain error in capital case for failure to raise objection during penalty hearing).

(b) However, if the substantive claims were not raised on appeal, raise them on collateral review and appeal any adverse decision to the Delaware Supreme Court.

2. PROCEDURAL DEFAULT

a. Determine whether the Delaware state courts refused to review the merits of a claim due to the application of an "independent and adequate" Delaware procedural rule. If yes, then the claims are procedurally defaulted for federal habeas purposes, precluding review of the merits unless you demonstrate cause for the default and prejudice resulting therefrom, or that a miscarriage of justice will result in the absence of such review.

(1) How to determine if claims are procedurally defaulted under the "independent and adequate" state ground doctrine:

(i) If, on direct appeal, the Delaware Supreme Court expressly applied Delaware Supreme Court Rule 8 to a particular claim and reviewed the claim for plain error, that claim is procedurally defaulted for federal habeas purposes. *See Campbell v. Burris*, - F.3d -, 2008 WL 383238 (3d Cir. Feb. 14, 2008).

(ii) However, if the Delaware Supreme Court applied Rule 8

to a claim on direct appeal, but then reviewed the merits of the claim on post-conviction appeal, you should argue that the claim has been adjudicated on the merits and is therefore not procedurally defaulted. *See, e.g., Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991)(explaining "if the last state court to be presented with a federal claim reaches the merits, it removes any bars to federal-court review that might otherwise have been available").

(ii) If, during the Delaware post-conviction proceeding, the Superior Court and Delaware Supreme Court expressly found the claim to be waived, or procedurally barred under Rule 61(i)(1), (2), (3) or (4), then the claim is procedurally defaulted for federal habeas purposes EVEN if the same Delaware court alternatively reviewed the claim on its merits. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Campbell v. Burris*, - F.3d -, 2008 WL 383238, *10 n.3 (3d Cir. Feb. 14, 2008).

b. Determine if there are unexhausted claims that cannot be exhausted at this juncture due to Delaware procedural rules. These claims are also procedurally defaulted for federal habeas purposes, and you must demonstrate cause and prejudice, or a miscarriage of justice, for the District Court to review the merits of those claims. *See, e.g., Jackson v. Carroll*, 2004 WL 1192650 (D. Del. May 20, 2004).

c. However, if the petitioner "fairly presented" the claim to the Delaware Supreme Court in the proper procedural manner, but the Delaware Supreme Court did not address the claim, the claim is NOT procedurally defaulted for federal habeas purposes. In this situation, the Delaware District Court would review the claim de novo. *See Holloway v. Horn*, 355 F.3d 707, 718 (3d Cir. 2004).

d. How to present procedurally defaulted claims in a habeas petition

(1) Attempt to demonstrate cause for the default, and prejudice resulting therefrom, so that the Delaware District Court can reach the merits of the claim. Examples of cause:

(a) Defense counsel failed to raise the claim on direct appeal. Ineffective assistance of counsel can constitute cause for a default, but only if the petitioner exhausted state remedies for the ineffective assistance of counsel claim and the attorney error was constitutionally deficient under *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) Cause may exist where "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" during the petitioner's state criminal proceedings. *Reed v. Ross*, 468 U.S. 1, 16 (1984); *see Shelton v. Snyder*, 2004 WL 4951050, *22 (D. Del. Mar. 31, 2004)(applying the rule articulated in *Reed v. Ross*).

(2) Attempt to demonstrate actual innocence. However, you must prove factual innocence, not legal insufficiency, with new reliable evidence that was not presented at trial. *House v. Bell*, 547 U.S. 518, 126 S.Ct. 2064, 2077-78 (2006). This standard is difficult to satisfy; you must demonstrate that, in light of the new evidence, it is more likely than not that any reasonable juror would have reasonable doubt about the petitioner's guilt. *Id.* at 2077.

C. HOW TO RECONCILE LIMITATIONS CONCERNS WHEN YOU WISH TO RAISE BOTH EXHAUSTED AND UNEXHAUSTED CLAIMS IN THE FEDERAL HABEAS PETITION

As a general rule, the District Court cannot review a mixed habeas petition (i.e., one that contains both exhausted and unexhausted claims), and absent limitations concerns, will dismiss the mixed petition without prejudice in order to enable the petitioner to return to state court and exhaust the unexhausted claims. *See, e.g., Cardone v.Carroll*, 2006 WL 2501546 (D. Del. Aug. 29, 2006). If you begin representing the petitioner during the state appellate stage, you should exhaust state remedies by raising your intended habeas claims in the automatic direct appeal, and then raise any ineffective assistance of counsel claims via a Rule 61 motion and subsequent post-conviction appeal. If you pursue post-conviction relief immediately or soon after the resolution of petitioner's direct appeal, you should be able to avoid any limitations issues so long as you quickly file the federal habeas petition upon completion of the post-conviction appeal. Always pay close attention to the one-year filing period.

However, there may be situations where your representation of the petitioner does not begin until AEDPA's limitations period is close to expiring. Further, suppose that petitioner exhausted his substantive habeas claims on direct appeal, and although he never filed a Rule 61 motion raising ineffective assistance of counsel claims, you conclude that the issue of defense counsel's performance should be raised in the federal habeas petition. If you wait to file the habeas petition until after the resolution of a newly filed Rule 61 proceeding, and the Rule 61 proceeding is decided after the expiration of AEDPA's one-year filing period, the petition will be time-barred. In this situation, you should:

a. File the mixed habeas petition along with a motion to stay the habeas

proceeding in order to permit the petitioner to exhaust state remedies for the unexhausted claims. A stay will be granted if the claims are potentially meritorious and you demonstrate good cause for the failure to exhaust state remedies at an earlier time. An example of good cause is petitioner's reasonable confusion about whether a state court filing would be timely. *Pace v. DiGuglielmo*, 544 U.S. 408, 416-17 (2005).

D. HOW TO PRESENT CLAIMS THAT ARE NOT PROCEDURALLY DEFAULTED AND HAVE BEEN ADJUDICATED ON THE MERITS IN STATE COURT

If the petitioner "fairly presented" his federal habeas claim to the Delaware Supreme Court in a proper procedural manner, and the Delaware Supreme Court reviewed the claim on its merits, then federal habeas relief will only be available if you demonstrate that the Delaware Supreme Court's decision was either contrary to, or an unreasonable application of, clearly established Federal law as determined by the United States Supreme Court.

1. "Clearly established Supreme Court precedent" for particular claims:

a. Ineffective assistance of counsel: *Strickland v. Washington*, 466 U.S. 668 (1984).

(1) Failure to adequately investigate potentially mitigating evidence for sentencing purposes. *See Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006).

b. Prosecutorial misconduct: *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

c. Insufficient evidence: *Jackson v. Virginia*, 443 U.S. 307 (1979).

d. State failed to provide exculpatory evidence: *Brady v. Maryland*, 373 U.S. 83 (1963).

E. CERTAIN CLAIMS ARE NOT COGNIZABLE ON FEDERAL HABEAS REVIEW

1. Fourth Amendment claims

a. Pursuant to *Stone v. Powell*, 428 U.S. 465, 494 (1976), federal courts cannot provide habeas review of Fourth Amendment claims if the

petitioner had a full and fair opportunity to litigate Fourth Amendment claims in the state courts. *See Wright v. West*, 505 U.S. 277, 293 (1992)("We have also held . . . that claims under *Mapp* [alleging evidence obtained in violation of the Fourth Amendment] are not cognizable on habeas as long as the courts have provided a full and fair opportunity to litigate them at trial or on direct review."). A petitioner has had a full and fair opportunity to litigate such claims if the state has an available mechanism for suppressing evidence seized in or tainted by an illegal search or seizure, irrespective of whether the petitioner actually availed himself of that mechanism. *See U.S. ex rel. Hickey v. Jeffes*, 571 F.2d 762, 766 (3d Cir. 1978); *Boyd v. Mintz*, 631 F.2d 247, 250 (3d Cir. 1980); *Petillo v. New Jersey*, 562 F.2d 903, 906-07 (3d Cir. 1977). However, Delaware permits the filing of pre-trial suppression motions under Rule 41 of the Delaware Superior Court Rules of Criminal Procedures, therefore, there is no structural defect in the state court system.

b. NOTE: a claim alleging ineffective assistance for failure to file a suppression motion is not barred by *Stone v. Powell*. *See Kimmelman v. Morrison*, 477 U.S. 365, 375-377 (1986).

2. State court determinations of state law

a. See *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) for an articulation of the rule.

b. Example
Alleged errors in state collateral proceedings are not a proper basis for federal habeas relief. *Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004).

3. Ineffective assistance of counsel on post-conviction or collateral review. 28 U.S.C. 2254(i).

Link to the Delaware Department of Correction's policy and procedures regarding execution by lethal injection:

http://www.doc.delaware.gov/pdfs/policies/procedure2-7redact.pdf

Link to transcript of oral argument in *Baze v. Rees*, No. 07-5439, January 7, 2008:

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-5439.pdf

Selected cases regarding constitutionality of lethal injection

Cooey v. Strickland, 479 F.3d 412 (6th Cir. 2007)

Emmett v. Johnson, 489 F.Supp.2d 543 (E.D. Va. 2007)

Evans v. Saar, 412 F.Supp.2d 519 (D. Md. 2006)

Hamilton v. Jones, 472 F.3d 814 (10th Cir. 2007)

Hill v. McDonough, 126 U.S. 2096 (2006)

Taylor v. Crawford, 487 F.3d 1072 (8th Cir. 2007)

Walker v. Johnson, 448 F.Supp.2d 719 (E.D. Va. 2006)

Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007)

Selected Federal *Habeas Corpus* Cases from the United States Supreme Court

General

Felker v. Turpin, 518 U.S. 651 (1996)

Statute of Limitations

See attached "Guide for pursuing federal *habeas* relief for Delaware state prisoners"

Retroactivity of New Rules (Cases) of Criminal Procedure

Teague v. Lane, 489 U.S. 299 (1988)
Stringer v. Black, 503 U.S. 222 (1992)
Beard v. Banks, 542 U.S. 406 (2004)
Danforth v. Minnesota, 552 U.S. ____ (2/20/2008)

AEDPA Standard of Review

Williams v. Taylor, 529 U.S. 362 (2000)
Mitchell v. Esparza, 540 U.S. 12 (2003)
Yarborough v. Alvarado, 541 U.S. 652 (2004)
Carey v. Musladin, 127 S.Ct. 649 (2006)
Schriro v. Landrigan, 127 S.Ct. 1933 (2007) (evidentiary hearing in federal court)
Fry v. Pliler, 127 S.Ct. 2321 (2007) (harmless error)

Exhaustion

Rose v. Lundy, 455 U.S. 509 (1982)
Duncan v. Henry, 513 U.S. 364 (1995)
O'Sullivan v. Boerckel, 526 U.S. 838 (1999)
Baldwin v. Reese, 541 U.S. 27 (2004)
Rhines v. Weber, 125 S.Ct. 1528 (2005)

Procedural Bars

Wainwright v. Sykes, 433 U.S. 72 (1977)
Reed v. Ross, 468 U.S. 1 (1984)
Smith v. Murray, 477 U.S. 527 (1986)
Johnson v. Mississippi, 486 U.S. 578 (1987)
Harris v. Reed, 489 U.S. 255 (1989)
Trest v. Cain, 522 U.S. 87 (1997)
Bousley v. United States, 118 S.Ct. 1604 (1998)
Williams v. Taylor, 529 U.S. 420 (2000) (alleged failure to develop factual basis)

Lee v. Kemna, 534 U.S. 362 (2002)
House v. Bell, 547 U.S. 518 (2006)

Discovery

Bracy v. Gramley, (1997)

Appeals

Miller El v. Cockerel, 537 U.S. 322 (2003)

Successor Petitions

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)
Tyler v. Cain, 533 U.S. 656 (2001)
Panetti v. Quarterman, 127 S.Ct. 2842 (2007)

STATUTORY PROVISIONS RELEVANT TO THE FILING OF PETITIONS FOR WRITS OF FEDERAL HABEAS CORPUS ON BEHALF OF DEFENDANTS CONVICTED IN STATE COURTS

Antiterrorism and Effective Death Penalty Act of 1996 as amended

United States Code, Title 28, Chapter 153

§ 2241. Power to grant writ

Effective: October 17, 2006

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may

be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

§ 2242. Application

Effective: [See Text Amendments]

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

§ 2243. Issuance of writ; return; hearing; decision

Effective: [See Text Amendments]

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. Finality of determination

Effective: April 24, 1996

a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody

pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 2251. Stay of State court proceedings
Effective: March 9, 2006

(a) In general.--

> (1) Pending matters.--A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding

against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

(2) Matter not pending.--For purposes of this section, a habeas corpus proceeding is not pending until the application is filed.

(3) Application for appointment of counsel.--If a State prisoner sentenced to death applies for appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.

(b) No further proceedings.--After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

§ 2253. Appeal
Effective: April 24, 1996

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 2254. State custody; remedies in Federal courts
Effective: April 24, 1996

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by

the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

United States Code, Title 28, Chapter 154 – (regarding prisoners in state custody subject to capital sentence)

§ 2261. Prisoners in State custody subject to capital sentence
Effective: March 9, 2006

(a) This chapter shall apply to cases arising under section 2254 brought by prisoners in State custody who are subject to a capital sentence. It shall apply only if the provisions of subsections (b) and (c) are satisfied.

(b) Counsel.--This chapter is applicable if—

(1) the Attorney General of the United States certifies that a State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265; and

(2) counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent.

(c) Any mechanism for the appointment, compensation, and reimbursement of counsel as provided in subsection (b) must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record—

(1) appointing one or more counsels to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable competently to decide whether to accept or reject the offer;
(2) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or

(3) denying the appointment of counsel upon a finding that the prisoner is not indigent.

(d) No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at

trial in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.

(e) The ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel, on the court's own motion or at the request of the prisoner, at any phase of State or Federal post-conviction proceedings on the basis of the ineffectiveness or incompetence of counsel in such proceedings.

§ 2262. Mandatory stay of execution; duration; limits on stays of execution; successive petitions

(a) Upon the entry in the appropriate State court of record of an order under section 2261(c), a warrant or order setting an execution date for a State prisoner shall be stayed upon application to any court that would have jurisdiction over any proceedings filed under section 2254. The application shall recite that the State has invoked the post-conviction review procedures of this chapter and that the scheduled execution is subject to stay.

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

(1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;

(2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or

(3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or at any subsequent stage of review.

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

§ 2263. Filing of habeas corpus application; time requirements; tolling rules

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

§ 2264. Scope of Federal review; district court adjudications

(a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is--

(1) the result of State action in violation of the Constitution or laws of the United States;

(2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or

(3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.

(b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.

§ 2265. Certification and judicial review

(a) Certification.—

(1) In general.--If requested by an appropriate State official, the Attorney General of the United States shall determine—

(A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;

(B) the date on which the mechanism described in subparagraph (A) was established; and

(C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

(2) Effective date.--The date the mechanism described in paragraph (1)(A) was established shall be the effective date of the certification under this subsection.

(3) Only express requirements.--There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.

(b) Regulations.--The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).

(c) Review of certification.--

(1) In general.--The determination by the Attorney General regarding whether to certify a State under this section is subject to review exclusively as provided under chapter 158 of this title.

(2) Venue.--The Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over matters under paragraph (1), subject to review by the Supreme Court under section 2350 of this title.

(3) Standard of review.--The determination by the Attorney General regarding whether to certify a State under this section shall be subject to de novo review.

§ 2266. Limitation periods for determining applications and motions

(a) The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters.

(b)(1)(A) A district court shall render a final determination and enter a final judgment on any application for a writ of habeas corpus brought under this chapter in a capital case not later than 450 days after the date on which the application is filed, or 60 days after the date on which the case is submitted for decision, whichever is earlier.

(B) A district court shall afford the parties at least 120 days in which to complete all actions, including the preparation of all pleadings and briefs, and if necessary, a hearing, prior to the submission of the case for decision.

(C)(i) A district court may delay for not more than one additional 30-day period beyond the period specified in subparagraph (A), the rendering of a determination of an application for a writ of habeas corpus if the court issues a written order making a finding, and stating the reasons for the finding, that the ends of justice that would be served by allowing the delay outweigh the best interests of the public and the applicant in a speedy disposition of the application.

(ii) The factors, among others, that a court shall consider in determining whether a delay in the disposition of an application is warranted are as follows:

(I) Whether the failure to allow the delay would be likely to result in a miscarriage of justice.

(II) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate briefing within the time limitations established by subparagraph (A).

(III)Whether the failure to allow a delay in a case that, taken as a whole, is not so unusual or so complex as described in subclause (II), but would otherwise deny the applicant reasonable time to obtain counsel, would unreasonably deny the applicant or the government continuity of counsel, or would deny counsel for the applicant or the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(iii) No delay in disposition shall be permissible because of general congestion of the court's calendar.

(iv) The court shall transmit a copy of any order issued under clause (i) to the Director of the Administrative Office of the United States Courts for inclusion in the report under paragraph (5).

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus following a remand by the court of appeals or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3)(A) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(B) No amendment to an application for a writ of habeas corpus under this chapter shall be permitted after the filing of the answer to the application, except on the grounds specified in section 2244(b).

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by petitioning for a writ of mandamus to the court of appeals. The court of appeals shall act on the petition for a writ of mandamus not later than 30 days after the filing of the petition.

(5)(A) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the district courts with the time limitations under this section.

(B) The report described in subparagraph (A) shall include copies of the orders submitted by the district courts under paragraph (1)(B)(iv).

(c)(1)(A) A court of appeals shall hear and render a final determination of any appeal of an order granting or denying, in whole or in part, an application brought under this chapter in a capital case not later than 120 days after the date on which the reply brief is filed, or if no reply brief is filed, not later than 120 days

after the date on which the answering brief is filed.

(B)(i) A court of appeals shall decide whether to grant a petition for rehearing or other request for rehearing en banc not later than 30 days after the date on which the petition for rehearing is filed unless a responsive pleading is required, in which case the court shall decide whether to grant the petition not later than 30 days after the date on which the responsive pleading is filed.

(ii) If a petition for rehearing or rehearing en banc is granted, the court of appeals shall hear and render a final determination of the appeal not later than 120 days after the date on which the order granting rehearing or rehearing en banc is entered.

(2) The time limitations under paragraph (1) shall apply to—

(A) an initial application for a writ of habeas corpus;

(B) any second or successive application for a writ of habeas corpus; and

(C) any redetermination of an application for a writ of habeas corpus or related appeal following a remand by the court of appeals en banc or the Supreme Court for further proceedings, in which case the limitation period shall run from the date the remand is ordered.

(3) The time limitations under this section shall not be construed to entitle an applicant to a stay of execution, to which the applicant would otherwise not be entitled, for the purpose of litigating any application or appeal.

(4)(A) The failure of a court to meet or comply with a time limitation under this section shall not be a ground for granting relief from a judgment of conviction or sentence.

(B) The State may enforce a time limitation under this section by applying for a writ of mandamus to the Supreme Court.

(5) The Administrative Office of the United States Courts shall submit to Congress an annual report on the compliance by the courts of appeals with the time limitations under this section.